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IN THE

# Supreme Court of the United States

INDYWAY INVESTMENT,
*Petitioner,*

*vs.*

DEBRA OPRI, an individual
OPRI & ASSOCIATES,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS
SECOND APPELLATE DISTRICT, DIVISION ONE

## PETITION FOR REHEARING

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## I. INTRODUCTION

This petition for rehearing is intended to clarify arguments advanced in original petition for writ of certiorari. *Hickman v. Taylor*, 327 U.S. 808, 328 U.S. 876, 329 U.S. 495; *Brinkerhoff-Faris Trust Co. v. Hill*, 280 U.S. 604, 550, 281.1

Debra Opri and Opri & Associates ("Respondent") dramatically focuses Indyway Investment's ("Petitioner") lack of prosecution and jurisdictional attention on this dichotomy in a novel interpretation of the California Revenue and Taxation Codes and is germane to the constitutionality issues of these statutes which Petitioner seeks to clarify below.

Petitioner respectfully submits that the instant case offers extraordinary circumstances of the taxing authorities abuse of the public auction process and requests that this Court to affirm its historic mandate prohibiting a state from depriving any person of life, liberty, or property, without due process of law as preserved under the Fifth and Fourteenth Amendments to the United States Constitution, as well as other constitutional protection as envisioned by the framers when confronted with the abusive consequences of due process of law violations.

Contrary to Respondent's opinion that Indyway was created to evade taxes, Indyway owned a fifth property having Assessor Parcel Number 7313-021-016 that is also named on Indyway's deed recorded on May 11, 1992 which was never in arrears with property taxes.

The underlying issue herein under review addresses the due process of law that must be

accorded to a citizen before the government can exercise the privileged power of taking and selling of his property.

This petition asks this Court to align the essential elements of due process of law, specifically the constitutional guaranty demanding only that the law shall be reasonable, and not arbitrary or capricious, and that the means selected shall have real substantial relation to object. *Nebbia v. People of State of New York, N. Y.*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940; *North American Co. v. Securities & Exchange Commission*, C.C.A.2, 133 F.2d 148, 154. And the opportunity to be heard and to defend in orderly proceeding and the guarantee of due process of law requires that every man have protection of day in court and benefit of general law. *Di Maio v. Reid*, 132 N.J.L. 17, 37 A.2d 829, 830.

The abusive consequences of violations of due process of law are of a degree of severity to justify this petition. The trial court prevented Petitioner from fully and fairly presenting its cause, coupled with the Court of Appeal's prejudicial and erroneous assumption that certain arguments were not presented in the trial court and not preserved on appeal.

This Petition for Rehearing is not meant to reargue that which is in the Petition for a Writ of Certiorari denied on October 6, 2008.

## II. STATEMENT OF THE CASE

This is an action for damages sustained by Indyway Investment ("Indyway") as a result of the legal malpractice committed by attorney Debra Opri and her law office Opri & Associates ("Opri").

Indyway had owned certain properties located in Long Beach, California ("the Subject Properties"), which the County of Los Angeles ("the County") sold at a tax-default property sale in June of 2000. Indyway had hired Opri to file a claim to set aside the tax sale of the Subject Properties. Instead, Opri filed a claim for the excess proceeds from the sale, and failed to file a claim to set aside the tax sale of the Subject Properties. On June 16, 2004, Indyway filed a verified complaint alleging legal malpractice and breach of contract against Opri.

A client sustains damages by his attorney's legal malpractice only where an attorney's error or omission caused a client to lose a meritorious claim. *See DiPalma v. Seldman* (1994) 27 Cal. 4th 1499, 1505. Thus, upon the parties' stipulation, the trial court ordered the bifurcation of issues at trial, so that it would first decide the issue of damages, namely whether a claim to set aside the tax sale of the Subject Properties would have been meritorious. The rationale for the bifurcation was that if damages could not be proven, there could be no case made for legal malpractice.

## III. REQUEST TO TAKE JUDICIAL NOTICE

Petitioner hereby requests this Court take judicial notice of facts referenced in Petitioner's other case filed with this Court on September 22, 2008, having Docket No. 08-392. This case mirrors the same extraordinary circumstances with the instant case except that the County failed to record a Rescission of Notice of Power to Sell required

under *California's Revenue and Taxation Code*[1] *section 4112(c)* after the real property had been redeemed, as stated under Questions Presented in petition for writ of certiorari.

## IV. REASONS FOR GRANTING THIS PETITION

### A. The Lower Courts Limited Indyway's Prosecution of its Case, Preventing Indyway From Fully and Fairly Presenting its Cause

In Indyway's Petition for Rehearing filed with the Court of Appeal on December 14, 2007, the Court of Appeal made an erroneous assumption that certain arguments were not presented to the trial court and not preserved on appeal. Furthermore, Indyway's Petition for Rehearing cited trial references which were supported by exhibits admitted and received into evidence.

The Court of Appeal stated in its discussion that Indyway's arguments constitute challenges to the sufficiency of the evidence and are without merits based on credibility determinations and inferences rejected by the trial court. Here, the Court of Appeal revealed that the trial court had limited Indyway's prosecution of its case to a narrow issue, preventing Indyway from fully and fairly presenting its cause which constituted an act of prejudice. Indyway contends that it never had a chance to prosecute its case on a fair playing field because the trial court disregarded the facts

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[1] Unless otherwise indicated, all code section references in this petition for rehearing are to *California's Revenue and Taxation Code.*

presented by Indyway at trial. *Hudgins v. State*, 2 Ga 173, 176.

In addition, the Court of Appeal also stated, "Indyway's brief also refers to exhibits which were not admitted at trial and not included in the appellate record." This statement by the Court of Appeal is patently misplaced because Indyway did include all exhibits admitted and received into evidence at trial as evident in Indyway's joint amended notice Designating Papers and Records filed on August 9, 2006.

Furthermore, with respect to the Rescission issue, the trial court stated, "It's a Due Process question. Was the property sold without Due Process of Law? So aren't we wasting a lot of time in looking at what the County did or did not do after the sale." [RT5 2127:27-28, 2128:1-3] [EX 41, EX 42]. Here, the trial court demonstrated how it disregarded the facts presented by Indyway at trial regarding the Rescissions of a Notice of Power to Sell, which is governed by *section 4112(c).*

### B. The County Employees' Testimonies Can be Characterized as Extrinsic Fraud Committed Against Indyway, in That They Affected the Manner in Which the Judgment Was Taken That There Has Not Been a Fair Submission of the Controversy to the Court

The County employees' testimonies can be characterized as extrinsic fraud committed against Indyway. The character of fraud which will afford a ground for setting aside a judgment, that is, fraud which is collateral to the issues tried in the case

wherein the judgment was rendered. 30A Am J Rev Ed Judgm § 657. For the purpose of a ground of equitable relief against a judgment, fraud which has prevented a party from having a trial, from presenting all his case to the court, or has so affected the manner in which the judgment was taken that there has not been a fair submission of the controversy to the court. *Farley v. Davis*, 10 Wash 2d 62, 116 P2d 263, 155 ALR 1302.

Although Indyway vehemently objected to the testimony of County Counsel, Joyce M. Aiello, the trial court allowed the witness to state a conclusion of law on whether due process was followed or not. [RT4 1205:1-14, 1213:18-23, 1214:8-22, 1216:7-28, 1217:1-15, 1218:21-28]. Similarly, the trial court denied Indyway's filed memorandum and motion to exclude the testimony of County Counsel to give her opinion as to whether there were irregularities in the whole statutory process before, during and after the purported tax sale of Indyway's Property. [1219 to 1220]. The trial court twice denied Indyway's attempt to voir dire the witness. [RT4 1211:4-18, 1212:13-15]. The testimony of County Counsel directly affected the interpretation of a statute, specifically *section 3691.1*, when the witness testified that she did not find any irregularities in the publication of auction. [RT4 1216:18, 1217:1-2].

Ultimately, the trial court allowed County Counsel to make a conclusion of law by stating, "My conclusion, there were no irregularities or errors in the sale of Parcels 13 and 14." [RT4 1221:4-12]. Indyway believes that the testimony of County Counsel, who was not an expert, who had not been designated to interpret the law directly affected the manner in which the judgment was taken and provides justification that the trial court did not fairly determine the issues before it.

In addition, *section 4112(c)* was cited in an exchange between Opri's counsel, Mr. Owen, and the trial court.

Mr. Owen: "Your Honor, if I might, I think we're getting a misstatement of law too because R&T Code Section 4112 specifically requires that a Notice of Rescission be filed any time the property is redeemed. So there's no error by the County - -"

The Court: "There really was no glitch in the System."

Mr. Owen: "There was no glitch in the System, but they found out it was a superfluous document. It wasn't necessary because the Tax Deed cancels the Notice of Power to Sell, but statutorily they're to do it. So it's not a glitch."

The Court: "There's also testimony of your witness, I think it was Ms. Perkins - -"

Mr. Owen: "Ms. Perkins."

The Court: "- - That they have corrected the System now. And in a case of a transfer of title subsequent to a tax evolved sale, the Notice of Rescission is not sent out at all."

Mr. Owen: "Not any longer. But when you read the statute, it's still required to be sent out. So it seems to me the statute is poorly written, but it certainly requires that the Cancellation of Rescission be filed. And I'm referring to R&T Code Section 4112(c)."

[Reporter's Transcript, Volume 5, page 2129, lines 6-28 and page 2130, lines 1-3.]

In the above exchange, Mr. Owen relied on the interpretation of *section 4112(c)* as support for the Cancellation of Rescission. However, the reading of this statute reveals no basis for such reliance. Under *section 4112(c)*, the **redemption** of a tax-defaulted property merely terminates the state's power to sell a tax-defaulted property. Mr. Owen's argument does not make any sense. Here, the trial court and Opri agreed that according to *section 4112(c)*, the County is required to execute a Rescission of Notice of Power to Sell. However, in Petitioner's other case filed with this Court on September 22, 2008, having Docket No. 08-392, that mirrors the same extraordinary circumstances, the County failed to do so. Herein lie the inconsistencies and contradictions in the application of the statutes.

Despite numerous requests from Indyway during discovery and pre-trial for the County's files regarding the tax sale of the Subject Properties, the County refused to produce the file until the trial judge ordered the County to do so on the last day of trial. [RT5 1524:17-28, 1525:1-6, 1526:23-28, 1527-1533]. This highly suspicious conduct by the County suggests that there was a clear attempt to suppress facts and to prevent Indyway from presenting and prosecuting its entire cause. The County's actions can be characterized as extrinsic fraud that directly affected the manner in which the judgment was taken.

### C. The Cancellation of Rescission Is a False Instrument Because It Cites a Code That Has No Relevance to the Document Which Is An Intrinsic Fraud

Intrinsic Fraud which occurs within framework of actual conduct of trial and pertains to and affects determination of issues presented therein, and it may be accomplished by perjury, or by use of false or forged instruments, or by concealment or misrepresentation of evidence. *Auerbach v. Samuels*, 10 Utah 2d 152, 349 P.2d 1112, 1114. Fraud is "intrinsic fraud" where judgment is founded on fraudulent instruments or perjured evidence or the fraudulent actions pertain to an issue involved in original action and litigated therein. *Alleghany Corp. v. Kirby*, D.C. N.Y., 218 F.Supp. 164, 183.

Species of fraud which renders the document void as, for example, an instrument signed by one who had neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms, is not enforceable even by a holder in due course because such fraud is intrinsic.

Respondent argued that ". . . the County erroneously generates a Rescission of the notice of power to sell. . . The County quickly discovered it post-sale error and filed a cancellation of the Rescission." At trial, the County testified that Rescissions of the notice of power to sell were mistakenly recorded for all ("several hundred parcels") properties subject to the 2000B tax sale because of a "glitch" in the System. [RT2 321:2-7; RT4 1519:1-24] [EX 41, EX 42]. The County explained that to rectify the "glitch", it recorded a Cancellation of Rescission of notice of power to sell.

[RT2 328:15-21] [EX 43, EX44]. A mistake with this magnitude would warrant the County to execute the Cancellations of Rescission as soon as possible. However, the County waited until July 24, 2002, almost twenty-one (21) months **after** the execution of the Rescissions of the notice of power to sell, to execute and record the Cancellation of Rescissions. At trial, Indyway argued that the Cancellations of Rescission cites *Revenue and Taxation Code, section 4992,* which has no relevance and does not support the documents. [RT2 328:15-26]. These Cancellations of Rescission are tantamount to wild deeds and are without legal validity or effect.

Moreover, these Cancellations of Rescission violate the *County Tax Collector's Reference Manual section 5475* because it does not show the name of the assessee as it was shown on the recorded Notices of Power to Sell. [EX 127]. These errors by the County are factors in the County's calculated and intentional actions of misleading and misinforming the trial court and Indyway of the true status of the Properties with these documents, which are "intrinsic fraud" where judgment is founded on fraudulent instruments or perjured evidence.

### D. The Lower Courts Had Decided on an Important Federal Question Raised in Indyway's Petition That Warrants This Court's Jurisdiction

Respondent challenged jurisdiction on the grounds that Indyway failed to identify basis for review under Supreme Court Rule 10(c) and the Court of Appeal never decided an important federal question. However, the trial court made the following finding of facts in its Statement of

Decision that are governed by *sections 3691.1 and 4112*, which were also affirmed by the Court of Appeal.

The Statement of Decision, Number 17 of the Findings of Fact, states, "Based on the testimony of Sharon Perkins, Martha Duran and Joyce Aiello and all of the received Exhibits, it was established that the County complied with all applicable laws and procedures in connection with conducting the June 26, 2000 Auction of Lot Nos. 13 & 14."

The trial court findings did not reference Indyway's challenge to *Revenue and Taxation Code sections 3691.1 and 4112(c).* The Court of Appeal dismissed Indyway's argument to these code sections for Indyway's apparent failure to raise the code sections or issues at trial. As set forth in Indyway's Petition for Rehearing filed with the Court of Appeal on December 14, 2007, Indyway did in fact raised and made the arguments of these sections supported by exhibits admitted and received into evidence to the trial court; it was the trial court that disregarded the arguments.

Numbers 19, 20 and 21 of the Findings of Fact, states that Indyway never redeemed its properties, failed to present any credible evidence which proved that the sale of its properties was ever rescinded, and failed to present any evidence which proved that the recording of the Rescissions of the notice of power to sell or the Cancellation of the Rescission violated Indyway's due process rights. The governing statute for the Redeeming provision is *section 4112(c).* As set forth in Indyway's Petition for Rehearing filed with the Court of Appeal on December 14, 2007, Indyway did in fact raised and made the arguments of Rescission and Redemption issues supported by exhibits admitted and received

into evidence to the trial court; it was the trial court that disregarded the arguments.

Respondent argued that "Indyway never raised *section 3711* in the California courts and is precluded from doing so." ROB-10. Respondent's argument on this issue is misplaced because it was her that raised the defense of *section 3711*, supporting the validity of tax sale. [RT2 52:17-25]

## V. CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Petition for Rehearing be granted, which would yield significant pronouncements on the disparity and conflicts between the interpretation of the *California Revenue and Taxation Code sections* set forth in original petition for writ of certiorari, because when applied, violate the Fifth and Fourteenth Amendments to the United States Constitution by taking property without due process of law.

Dated: October 28, 2008

Respectfully submitted,

ARTIANO & ASSOCIATES, APC

By: JAMES ARTIANO

*Attorneys for Petitioner*
Indyway Investment

## CERTIFICATION OF COUNSEL

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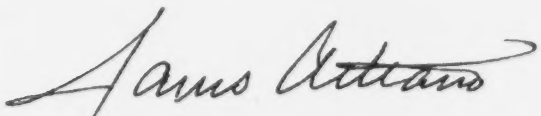
As required by Supreme Court Rule 44(1) and (2), I certify that the Petition for Rehearing of the Order Denying the Petition for Writ of Certiorari is presented in good faith and not for the purposes of delay.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of October, 2008.

Respectfully submitted,

ARTIANO & ASSOCIATES, APC



By: JAMES ARTIANO

*Attorneys for Petitioner*
Indyway Investment

# APPENDIX

# WEST'S ANNOTATED CALIFORNIA REVENUE AND TAXATION CODE

Division 1. Property Taxation
Part 6. Tax Sales
Chapter 7. Sale to Private Parties After Deed to State

## § 3691.1. Notice of parcel becoming subject to power of sale; acknowledgment

The tax collector shall execute a notice whenever a parcel becomes subject to the power of sale set forth in Section 3691 on a form prescribed by the Controller. The county clerk shall take acknowledgment of the notice without charge.

Division 1. Property Taxation
Part 7. Redemption
Chapter 1. Redemption Generally

## § 4112. Collection of fees; effect of redemption; execution and recording of rescission of notice

(a) When tax-defaulted property subject to the notice recorded under Section 3691.4 is redeemed, the tax collector shall collect all of the following, in addition to the amount required to redeem:

(1) A fee of thirty-five dollars ($35) that shall be distributed to the county general fund to reimburse the county for its cost of obtaining the names and last known mailing addresses of, and for mailing notices

required by Section 3701 to, parties of interest as defined by Section 4675.

(2) A fee in the amount required by Section 27361.3 of the Government Code that shall be distributed to the county recorder for the cost of recordation of a rescission of the notice, as required by subdivision (c).

(3) A fee of one hundred fifty dollars ($150) if redemption is within 90 days of the proposed date for the tax sale of the redeemed property. In the case of unsold tax sale properties remaining on the abstract after the tax sale, the fee shall become a part of the redemption amount and collectible whenever the property is redeemed. The fee shall be distributed to the county general fund to reimburse the county for costs incurred by the county in preparing to conduct that sale.

(4) The amount described in subdivision (c) of Section 3704.7 to reimburse the county for the cost of a personal contact required by that section.

(b) Notwithstanding subdivision (a), if the tax-defaulted property is redeemed prior to the proposed sale, but after the county has incurred notice or publication costs pursuant to Section 3702 in connection with a notice of intended sale, a fee in an amount reasonably necessary to reimburse the tax collector for those costs may be collected.

(c) When tax-defaulted property subject to the notice recorded under Section 3691.4 is redeemed, the notice

becomes null and void and the tax collector shall execute and record with the county recorder a rescission of the notice in the form prescribed by the Controller. The rescission shall be acknowledged by the county clerk, without charge.

(d) Any fee imposed under paragraph (1) of subdivision (a) or subdivision (b) shall be subject to the requirements of Section 54986 of the Government Code.

Division 1. Property Taxation
Part 9. Corrections, Cancellations, and Refunds
Chapter 4. Cancellations (Refs & Annos)
Article 1. Generally (Refs & Annos)

**§ 4992. Cancellation of power to sell; entry on records**

If the tax collector declares property subject to a power of sale pursuant to Section 3691 and, either (a) the declaration that the property is tax defaulted is canceled under Section 4991, or (b) the power to sell is void because of any error occurring subsequent to the declaration, then the tax collector, with the approval of the auditor, shall cancel the power to sell in the form prescribed by the Controller. The cancellation shall be acknowledged, without charge, and shall be recorded with the county recorder, without charge.

The fact and date of the cancellation shall be entered on the abstract or electronic data processing records.